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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 102

HOTPOINT CO., A DIVISION OF GENERAL ELECTRIC COMPANY, A NEW YORK CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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WILLIAMS AND LEONARD,
Of Counsel.

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Petitioner,

vs.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Hotpoint Co., a Division of General Electric Company, a New York Corporation (formerly Hotpoint Inc.) (formerly Edison General Electric Appliance Co. Inc.), respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review and reverse the judgment of the United States Court of Claims entered January 5, 1954 dismissing Petitioner's petition for a money judgment against the United States, and also the order of said Court entered March 2, 1954, overruling Petitioner's motion for rehearing, and to remand said cause to the United States Court of Claims with directions

to enter judgment for Petitioner and against the United States for $18,934.88 as prayed in its petition in the Court of Claims, and for such other relief as may be just and proper.

Summary of the Matter Involved

This is a petition by Hotpoint Co., a Division of General Electric Company, petitioner herein, for a money judgment of $18,934.88 against the United States pursuant to Section 13(b); 58 Stat. 649, 660) Petitioner on June 9, 1953 filed a motion for summary judgment against respondent. Respondent on July 15, 1953 filed a response thereto and a cross-motion for a summary judgment dismissing said petition (R. 120).

On October 5, 1953, the cause was submitted to the Court of Claims on both motions (R. 121). On January 5, 1954 the Court entered judgment denying petitioner's motion for summary judgment and granting defendant's motion and dismissed petitioner's petition (R. 121), and on March 2, 1954 overruled a Petition for rehearing (R. 129).

No question of fact is involved. The undisputed facts as appear from the decision of the Court of Claims are as follows:

Petitioner is suing the United States for $18,934,88 representing charitable contributions by it during the years 1942 to 1945 on the ground that the contributions are reimbursable costs under its cost-plus-fixed fee manufacturing contract with the War Department (now the Department of the Army). These contributions were monies given by petitioner to the Community Fund Inc., the American Red Cross and the National War Fund Inc. during the years 1942 to 1945, prorated between the total employees of petitioner and those manufacturing employees engaged exclusively in the performance of said contract (R. 3-5).

Petitioner's contract, entered into on March 18th, 1942

was for the installation and operation of an ordnance manufacturing facility at Illinois to produce caliber .50 armor piercing cores and caliber .50 tubular dowel pins, which was terminated on July 31, 1945. The contribution of $18,934.88 claimed by petitioner as a cost of performance were included in petitioner's total contribution to the charities above named, which petitioner allocated to said contract, the allocation being made on the basis of the number of employees working on this manufacturing contract as above stated (R. 3-5).

The pertinent portions of the contract are as follows:

"TITLE II

OPERATION OF PLANT

Article II-A-Statement of Work.

6. In carrying out the work under this Title II the Contractor is authorized to do and shall do all things necessary or convenient in the operating and closing down of the Project, or any part thereof * * *.

TITLE III

COST OF THE WORK AND PAYMENT THEREFOR

Article III-A-Reimbursement for Contractor's Expenditures.

1. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual expenditures in the performance of the work under this contract, as may be approved or ratified by the Contracting Officer, and as are included in but not limited to the following items: * * *

1. Extra compensation to employees, discontinuance wages and a proper proportionate share of costs of maintenance of welfare, pension and other employee relations plans maintained by the Contractor; Provided, that the Government shall be chargeable therefor only insofar as the same are consistent with the general

employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of employees, or are expressly authorized in writing by Contracting Officer.
General.

5. No salaries of the Contractor's corporate executive officers, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as otherwise specifically provided herein, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work." (R. 14, 15, 21, 24, 25-26)

Petitioner's request for reimbursement for these contributions as an item of performing the manufacturing contract was denied by the contracting officer and his decision was affirmed by the Appeal Board Office of Contract Settlements (R. 6).

The issue involved is whether these contributions are a reimbursable item of manufacturing cost within the terms of the contract. Petitioner contends that it is entitled to reimbursement under either Article II-A, 6, or under Article III-A 1, l (R. 24) above quoted (Petition p. 3) and that Article III-A 5 (R. 25-26) above quoted is not applicable. The respondent contends that Article III-A 5, precludes reimbursement (R. 123) on the ground that petitioner's charitable contributions are "overhead expenses" within the meaning of that provision.

Jurisdictional Statement

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by U. S. C. Title 28 Sec. 1255 (1).

Opinions Below

The Court of Claims rendered an opinion in its judgment of January 5, 1954, which is set forth verbatim in the record (R. 121) and is reported, in 117 F. Supp. 572 but rendered no opinion in its order of March 2, 1954 overruling petitioner's motion for rehearing (R. 129).

Statute Involved

The Statute here involved is Section 13 (b) of the United States Contract Settlement Act of 1944 reading as follows:

> "(b) Whenever any war contractor is aggrieved by the findings of a contracting agency of his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—
>
> (1) appeal to the Appeal Board in accordance with subsection (d) of this section; or
>
> (2) bring suit against the United States for such climax or such part thereof, in the Court of Claims." 41 U. S. C. Sec. 113 (b).

The Questions Presented

1. Is petitioner entitled to reimbursement for reasonable contributions made to recognized charities in pursuance of a well established custom on a per capita basis under Article II-A and Article III-A of the manufacturing contract in question?

2. Are the charitable contributions in question reimbursable expenses or costs recoverable under Section 13(b) of the Contract Settlement Act of 1944 (41 U. S. C. Sec. 113 (b): 58 Stat. 649,660) under Article III-A (1) (l) of contract in question as respondent's share of the costs of maintenance of a welfare or other employee relations plan?

3. Are the charitable contributions in question reimbursable expenses or costs recoverable under Section 13 (b) of the Contract Settlement Act of 1944 (41 U. S. C. Sec. 113 (b); Stat. 649,660) under Article II-A 6 of the manufacturing contract in question providing that petitioner might do anything necessary or convenient in furtherance of the contract?

4. Is Article III-A (5) denying petitioner reimbursement for overhead expenses inapplicable because under generally recognized cost accounting principles corporate charitable contributions are not overhead but are indirect manufacturing expense?

Reasons for Allowance of Writ of Certiorari

1. Important questions of law are presented involving the interpretation and construction not merely of the contract in question but of numerous other contracts relating to defense or other matters between the United States Government and private individuals which involve charitable contributions and their status as reimbursable costs. Such questions are of broad general interest, and the interpretation of such contracts may be affected by the decision of this Court. To clarify such matters, an authoritative statement by this Court is necessary.

2. So far as we can find after a thorough investigation, the question of charitable contributions as reimbursable costs on Government contracts has not been passed upon by this Court and is one of first instance here.

3. The decision of the Court of Claims is inconsistent with the present practice in administering United States Government contracts as is shown by T. D. 5000 and its incorporation in Government contracts.

4. Under the contract in question, and similar contracts such contributions can only be construed as reimbursable

costs as the Government's share of the cost of maintenance of a welfare or other employee relations plan.

5. Such charitable contributions under generally recognized principles of cost accounting are indirect manufacturing costs. The inclusion of such contributions as overhead by the decision of the Court of Claims (R. 121) is contrary to generally recognized principles of cost accounting in the electrical industry and in general.

A supporting brief accompanies this petition.

WHEREFORE, petitioner respectfully prays that this Honorable Court issue a writ of certiorari as hereinbefore prayed.

Respectfully submitted,

HOTPOINT CO., a Division of
General Electric Company,
a New York Corporation,
Petitioner,

By EDNYFED H. WILLIAMS,
By JOHN M. LEONARD, JR.,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Specification of Errors

1. The Court of Claims in its judgment of January 5, 1954, erred (a) in denying petitioner's motion for summary judgment; (b) in granting respondent's motion for summary judgment; (c) in dismissing petitioner's petition for a money judgment against the United States.

2. The Court of Claims in its order of March 2, 1954, erred in overruling petitioner's motion for rehearing.

3. The Court of Claims in interpreting Article III-A, 1, l, of the contract involved erred (a) in limiting the term "maintenance of welfare, pension, and other employee welfare plans" to such items as are the subject of collective bargaining, and in drawing a distinction between public welfare work and employee welfare work; and (b) in failing to hold that the charitable contributions in question are respondent's share of the costs of maintenance of a welfare or other employee relations plan.

4. The Court of Claims erred in failing to hold that the charitable contributions in question are reimbursable items of costs under Article II-A and Article III-A, 1, l, of the contract involved.

5. In interpreting Article III-A, 5, of the contract involved, the Court of Claims erred (a) in failing to give to the term "overhead" its usual and ordinary meaning; (b) in ruling that the charitable contributions in question constituted an item of overhead prohibited by said Article; and (c) in ruling that said Article was not ambiguous and in failing to construe said Article against the respondent because of such ambiguity.

I

Under the contract involved and similar contracts, the charitable contributions in question can only be construed

as reimbursable costs as respondent's share of the cost of maintenance of a welfare or other employee relations plan.

Treasury Decision 5000, 35 Treasury Decisions;
Internal Revenue 386, 400;
Treasury Memorandum 14-1000 Section IX;
Hudson Motor Car Company, B. C. A. No. 134;
American Rolling Mill v. *Comm.*, 41 F. 2d, 314, 315;
Federal Cartridge Corporation v. *U. S.*, 77 F. Supp. 380;
Stewart-Warner Corporation v. *Army, Office of Contract Settlement, Appeal Board Proceeding* No. 329, Oct. 25, 1950, Commerce Clearing House 5 Contract Cases Federal par. 61, 152.

Costs of maintenance of a welfare or other employee relations plan are not limited to such costs, as are the subject of collective bargaining.

Cross & Co. v. *N. L. R. B.*, 174 F. 2nd, 875;
Hudson Motor Car v. *Navy* (O. C. S. No. 110, 1947) C. C. H. 4 Contract Cases Federal par. 60, 335;
Kaiser Cargo, Inc. (W. D. B. C. A. Nos. 1097-1102, 1104, 1110-1113, 1116-1132, 1946) C. C. H. 4 Contract Cases Federal par. 60, 100;
Comptroller General's Decision No. B- 27029, Aug. 24, 1942.

The Petitioner's contention that the charitable contributions in question are reimbursable costs is supported by the present practice in administering United States government contracts. The contract in question was entered into on March 18, 1942 (R. 9) scarcely three months after Pearl Harbor. The United States government has issued Treasury Memorandum 14-1000 section IX of which reads as follows:

> 221. The Contractor will be normally called upon to make contributions to charitable and community organizations.

22. Such contributions will constitute reimbursable costs when made to charitable, religious, scientific, or educational organizations which are approved by the Treasury Department.

223. In determining whether a contribution is reasonable in amount, the contracting officer should give consideration both to past policies of the contractor and the expanded scope of the contractor's current activities.

224. Contributions to so-called "national" organizations are allowable if the organization either solicits its funds locally or the local area receives funds or benefits therefrom.

And also Treasury Decision 5000, Section 26.9(g)(4) of which reads as follows:

(4) Other expenses.—Miscellaneous office and administrative expenses, such as stationery and office supplies; postage; repair and depreciation of office equipment; contributions to local charitable or community organizations to the extent constituting ordinary and necessary business expenses; employee's welfare expenses.

35 Treasury Decisions Internal Revenue pp. 386, 400.

The foregoing rulings of the Government respondent herein, under authorities herein above cited embody merely an existing practice; of the benefit of which petitioner should not be deprived.

Under the authorities above cited under this heading and under Article III-A1, l, of the contract involved, such costs are not limited to those which are the subject of collective bargaining. In Article III-A1, l, three separate tests are provided whereby these items of costs allowed thereby are to be tested, at least one of which any cost item must pass. They are: (1) That the given cost is consistent with the general employee relations policies existing throughout the Contractor's organization, or (2) is incurred pur-

suant to agreement made as a result of collective bargaining or (3) as expressly authorized in writing by the Contracting Officer (R. 24). The Court of Claims in its decision made the test of collective bargaining the supreme test under this Article, ignoring the other two tests. This Article we submit is unwarranted under the contract and the law in general.

II

The Charitable contributions in question under generally recognized principles of cost accounting are indirect manufacturing costs. Inclusive of such contributions as overhead is contrary to generally recognized principles of cost accounting.

Under cost accounting as distinguished from financial accounting, charitable contributions are not overhead but are indirect manufacturing costs.

"The Uniform Accounting Manual for the Electrical Manufacturing Industry (Sixth Edition 8/3) (Plaintiff's Ex. 6) (R. 132). Part 1, Section 3, Sub. Group 33, Par. 331, Item 3319.

Salier: Basic Accounting Principles p. 539.

J. K. Lasserat: Handbook of Accounting Methods p. 704.

Wade: Fundamentals of Accounting p. 354.

Sanders: Cost Accounting for Control 2nd Ed. 1934 pp. 3-6, 7, 243-4.

Lawrence: Cost Accounting 3rd. Ed. 1946 pp. 2-5, 183-184.

Neuner: Cost Accounting Principles and Practice 3rd Ed. 1951, pp. 30, 33, 146, 246-7, 271.

Maze and Glover: How to Analyze Costs, 1929, p. 285.

Lockwood and Maxwell: Textile Costing, an Aid to Management, 1945 p. 117.

Wynkoop, Hallenbeck, Crawford & Co. v. *Western Union* 268 NY 108, 196 NE 760.

Northwest Airlines, Inc. B. C. A. No. 283.

Bartelt Engineering Company Armed Services, B. C. A. No. 701, Army Contract Appeals Panel Division, No. 2, Feb. 15, 1952.

Howard H. Cork: Costs in the Negotiation Pricing, Repricing and Settlement of Defense Contracts N. A. C. A. Bulletin, July 1952, p. 1412.

The term "overhead" under the construction most favorable to respondent is ambiguous. Since the contract was prepared by respondent this ambiguity should be construed against the latter.

Kiewit & Sons v. *U. S.* 109 Ct. Cl. 390.

Stewart-Warner Corporation v. *Army, Office of Contract Settlement Appeal Board, Proceeding No. 329,* Oct. 25, 1950.

Wynkoop, Hallenbeck, Crawford & Co. v. *Western Union* 268 NY 108, 196 NE 760.

C. Behlan & Sons v. *Ricketts,* 30 Ohio App. 1, 164 NE 436.

In holding that charitable contributions constitute overhead the Court of Claims confused financial accounting with cost accounting, as appears from its adoption of the definition of overhead in *Lytle, Campbell & Co.* v. *Somers, Fitler & Todd Co.,* 276, Pa. 409, 120 Atl. 409, 27 A. L. R. 41, 43 (R. 125) which in substance was that all items of expense except those of labor or materials which directly produce a definite end, constitute overhead. This definition while applicable to financial accounting, is inapplicable to cost accounting, under Article VI E. 1, of the Contract which provided that the Contractor keep records and books of

account on a recognized cost accounting basis (R. 41). Both parties employed cost accounting here.

Under the Uniform Accounting Manual for the Electrical Manufacturing Industry (Plaintiff's Exhibit VI) (R. 132) and the other authorities herein above cited such charitable contributions under a cost accounting system as bearing on production though indirectly would be classified as indirect manufacturing costs and not overhead. Petitioner in accordance with the Manual above mentioned in force in the industry to which Petitioner belonged in regular practice allocated charitable contributions to manufacturing operations as indirect manufacturing expense.

Under these authorities the term "overhead" in cost accounting, while including administrative as distinguished from manufacturing costs has no specific meaning, and at most could be considered only ambiguous. Such Ambiguity under the authorities above cited is to be resolved against the respondent which prepared the contract.

Respectfully submitted,

HOTPOINT CO.,
a Division of General Electric Company,
a New York Corporation,
Petitioner,
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